

No. 76-1052

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL.,
PETITIONERS

v.

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D. C.,
CHAPTER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the district court (Pet. App. A) is reported at 14 F.E.P. Cases 83. Petitioners are seeking a writ of certiorari before judgment in the court of appeals and thus there is no opinion on the merits by that court.

JURISDICTION

The judgment of the district court (Pet. App. B) was entered December 6, 1976. On December 16, 1976, petitioners filed notices of appeal from that judgment. These appeals have been docketed and consolidated in the court of appeals (Pet. App. D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 2000e-8(e) and 44 U.S.C. 3508(a) bar a federal agency other than the Equal Employment Opportunity Commission from disclosing a private employer's EEO-1 reports.

2. Whether confidential statistical data contained in a private employer's EEO-1 reports and related affirmative action plans are exempt from disclosure under exemption 3 of the Freedom of Information Act in conjunction with 18 U.S.C. 1905.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth at Pet. App. E.

STATEMENT

Petitioners¹ brought these actions in the United States District Court for the District of Columbia, seeking to enjoin the federal respondents² from complying with a Freedom of Information Act ("FOIA") request by respondent National Organization for Women, Washington, D. C., Chapter ("NOW"), for the disclosure of certain documents that petitioners had furnished to the federal respondents pursuant to their contractual obligations to be

¹Petitioners are the Prudential Life Insurance Company, John Hancock Mutual Insurance Company, and Metropolitan Life Insurance Company.

²The federal respondents are the Secretary of Health, Education, and Welfare, the Commissioner of Social Security, the Chief of the Insurance Compliance Staff of the Social Security Administration, the Secretary of Labor, and the Director of the Office of Federal Contract Compliance Programs.

equal opportunity employers.³ See Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303. The documents at issue are Equal Employment Opportunity Forms 100 ("EEO-1's") and Affirmative Action Plans ("AAP's"), which government contractors are required to submit to the federal respondents to aid in monitoring compliance with the federal government's equal employment opportunity program, and Compliance Review Reports ("CRR's"), which are periodic reports prepared by the Insurance Compliance Staff of the Social Security Administration to determine whether the contractor is complying with the equal employment opportunity program. See 41 C.F.R. Part 60.

On petitioners' motion for a preliminary injunction, the district court granted partial relief, ordering that certain parts of the AAP's and CRR's should be withheld from disclosure but that the remainder of those documents, and all of the EEO-1 reports, could be disclosed. The district court found that there was a "substantial likelihood" that the portions of the AAP's and CRR's ordered withheld contained information that was exempt from mandatory

³The proceedings in the district court began as a suit for disclosure of the documents, brought by respondent NOW against the federal respondents and petitioners. Petitioners asserted "reverse FOIA" cross-claims against the federal respondents to enjoin any contemplated disclosure. *National Organization for Women, Washington, D.C. Chapter v. Social Security Administration of the Dept. of HEW, et al.*, D. D.C., Civil No. 76-0087. That case was consolidated with a separate and earlier suit brought by petitioner Metropolitan Life Insurance Company to enjoin the disclosure of its documents subject to respondent NOW's FOIA request. *Metropolitan Life Insurance Co. v. Usery, et al.*, D. D.C., Civil No. 70-914.

disclosure under exemption 4 of the FOIA⁴ (Pet. App. 5a-6a, 11a-28a), and that while the exempt nature of such information did not alone prohibit disclosure, in the circumstances of this case disclosure would constitute an abuse of the agency's discretion⁵ (Pet. App. 35a-40a).

The district court rejected petitioners' arguments that disclosure of the EEO-1's was prohibited by Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 264, 42 U.S.C. 2000e-8(e), and 44 U.S.C. 3508; the court also rejected the argument that disclosure of the EEO-1's and AAP's was prohibited by 18 U.S.C. 1905. Relying on prior decisions of the District of Columbia Circuit (e.g., *Sears, Roebuck & Co. v. General Services Administration*, 509 F. 2d 527), the district court held that neither Section 709(e) nor 44 U.S.C. 3508 were applicable to the documents in issue (Pet. App. 8a-9a). With respect to 18 U.S.C. 1905, which is a criminal statute prohibiting government officials from disclosing certain information "in any manner or to any extent not authorized by law," the district court again followed prior decisions of the District of Columbia Circuit (e.g., *Charles River Park "A", Inc. v. Department of Housing and Urban Development*, 519 F. 2d 935; see also *National Parks and Conservation Association v. Kleppe*, 547 F. 2d 673) and held that that statute prohibited only the disclosure of information that was exempted from mandatory disclosure under exemption 4 of the FOIA (see Pet. App. 10a, 35a-36a).

⁴Exemption 4 provides that the requirement of mandatory disclosure in the FOIA "does not apply to matters that are— * * * trade secrets and commercial or financial information obtained from a person and privileged or confidential * * * ." 5 U.S.C. 552(b) (4).

⁵The court also ruled that certain portions of the AAP's contained information protected from mandatory disclosure under exemption 6 of the FOIA, 5 U.S.C. 552(b)(6). Exemption 6 applies to information the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy."

In short, although the district court found that there is a "substantial likelihood" that portions of the AAP's and CRR's should not be disclosed (Pet. App. 11a, 35a-36a), the court concluded that none of the statutes relied upon by petitioners "specifically exempted [the documents] from disclosure" within the meaning of exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).⁶

Both petitioners and respondent NOW appealed, and the petition for a writ of certiorari before judgment followed.⁷

⁶Effective March 12, 1977, exemption 3 has been amended (Pub. L. 94-409, 90 Stat. 1247) to apply to matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

⁷At petitioners' request, the district court stayed its judgment and enjoined the federal respondents from disclosing any of the documents pending petitioners' application for a stay in the court of appeals (Pet. App. 44a-45a).

Petitioners' motions for a stay in the court of appeals requested that disclosure be enjoined until a petition for a writ of certiorari before judgment could be filed or, alternatively, until applications for a stay could be filed in this Court. On January 19, 1977, the court of appeals denied the stay application.

Before the court of appeals acted upon the stay application petitioners applied to this Court for a stay pending disposition of the instant petition for a writ of certiorari before judgment. On January 26, 1977, the Chief Justice granted the stay "pending filing of a memorandum by the Solicitor General of the United States and further consideration and order by the Chief Justice or by the Court." The Solicitor General, on March 9, 1977, filed an opposition to petitioners' stay application. The question of the stay is pending before the Court.

ARGUMENT

1. Issuance of a writ of certiorari before judgment in the court of appeals is an extraordinary procedure. Under Rule 20 of the Rules of this Court, a petition for such a writ will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." No such showing can be made in this case. Cf. *United States v. Nixon*, 418 U.S. 683; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579.

The questions presented by petitioners in this case are whether Section 709(e) and 44 U.S.C. 3508 prohibit the federal respondents from disclosing the EEO-1 reports in their possession and whether 18 U.S.C. 1905 is comprehended by exemption 3 of the FOIA so that information within its coverage is both exempt from mandatory disclosure under the FOIA and nondisclosable. Neither of these questions are of such imperative public importance as to warrant review by this Court before judgment in the court of appeals.

Section 709(e) prohibits the disclosure by "any officer or employee of the [Equal Employment Opportunity] Commission" of information "obtained by the Commission pursuant to its authority * * * ." 42 U.S.C. 2000e-8(e). However, as the district court pointed out (Pet. App. 1a, 8a), none of the documents at issue was obtained by the EEOC. Instead, the material was obtained by the Insurance Compliance Staff of the Social Security Administration pursuant to Executive Order 11246 and the regulations promulgated thereunder (41 C.F.R. Part 60). Moreover, none of the federal respondents is an "officer or employee of the Commission." Thus, the district court correctly held that Section 709(e) by its own terms has no bearing upon the

disclosability of the documents at issue in this case.⁸ There is no conflict among the courts of appeals on this issue.⁹ See, e.g., *Sears, Roebuck & Co. v. General Services Administration*, *supra*; *Westinghouse Electric Corporation v. Schlesinger*, 542 F. 2d 1190 (C.A. 4), petition for a writ of certiorari filed February 28, 1977 (No. 76-1192) (see pp. 9-12, *infra*).

On the second question presented, petitioners contend (Pet. 20) that review is necessary to resolve a clear conflict in the courts of appeals "on whether [exemption 3] in the FOIA incorporates 18 U.S.C. 1905." Petitioners are correct that the courts of appeals presently are divided on this issue. Compare, e.g., *Sears, Roebuck & Co. v. General Services Administration*, *supra*, 509 F. 2d at 529, with *Westinghouse Electric Corporation v. Schlesinger*, *supra*, 542 F. 2d at 1199-1203. Subsequent to those decisions, however, an amendment to exemption 3 that may have bearing upon the conflict has taken effect (see note 6, *supra*). The District of Columbia Circuit has since reaffirmed its view that 18

⁸Similarly, the district court correctly held that 44 U.S.C. 3508 also was inapplicable (Pet. App. 9a). That statute prohibits officials of one government agency from disclosing information received from another agency, where the transmitting agency is itself prohibited from publicly disclosing the information. Here, the Insurance Compliance Staff did not receive petitioners' EEO-1 reports from the EEOC, which is bound by the nondisclosure provision in Section 709(e), but, rather, from the Joint Reporting Committee, which is not bound by any such provisions. Accordingly, 44 U.S.C. 3508 does not make Section 709(e) applicable to this case. See *Sears, Roebuck & Co. v. General Services Administration*, *supra*, 509 F. 2d at 529.

⁹Justice Douglas once expressed the view that there is a "substantial question" concerning the applicability of Section 709(e) to cases like this one. *Chamber of Commerce v. Legal Aid Society*, 423 U.S. 1309, 1311-1312 (in chambers). That question, however, uniformly has been decided against petitioners' contentions by the courts that have squarely faced the question.

U.S.C. 1905 is not within the ambit of exemption 3. *National Parks and Conservation Association v. Kleppe*, *supra*. But the Fourth Circuit has not yet reconsidered its contrary holding in *Westinghouse Electric* in light of the new wording of the statute. Such reconsideration, which may resolve the conflict, would appear to be appropriate before this Court undertakes to resolve the issue.¹⁰

In any event, it is not clear what practical significance this issue has for this or any other case. Petitioners advance the theory that 18 U.S.C. 1905 is an exemption 3 statute as one basis for insulating from mandatory disclosure EEO-1 reports and AAP's "insofar as they contain confidential statistical data."¹¹ But "confidential statistical data" may already be exempt from mandatory disclosure by exemption 4 of the FOIA, which pertains to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." To the extent that information of the character described in 18 U.S.C. 1905 is exempt from mandatory disclosure by

¹⁰The Fourth Circuit, in holding that 18 U.S.C. 1905 was an exemption 3 statute, depended in large measure upon analogy to this Court's decision in *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, which concerned Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504. But the express congressional purpose of the recent amendment to exemption 3 was to effect a legislative overruling of the specific holding in *Robertson*. See H.R. Rep. No. 94-1178, 94th Cong., 2d Sess. 14 (1976).

¹¹18 U.S.C. 1905 forbids the disclosure of certain information, including "confidential statistical data," "to any extent not authorized by law." The disclosure of such information that is not exempt from mandatory disclosure under the FOIA is "authorized" by the FOIA. Thus, in order for petitioners to be able to rely upon 18 U.S.C. 1905 as a basis for nondisclosure, they must at a minimum show that the information is exempt from mandatory disclosure under the FOIA.

exemption 4,¹² there is no need to determine whether the information also is protected by exemption 3.

2. Petitioners suggest (Pet. 28-29) that certiorari before judgment is appropriate here because the government may petition for a writ of certiorari in *Westinghouse Electric* and raise issues "identical to the issues * * * raise[d] in the instant case." On February 28, 1977, the Solicitor General did file a petition for a writ of certiorari in *Westinghouse Electric* (No. 76-1192). But the questions presented in the petition in that case are significantly different from the questions petitioners have presented here. If the Court grants the petition in *Westinghouse Electric*, it will have no occasion to reach the questions presented in this case.

As the petition in *Westinghouse Electric* shows (No. 76-1192, Pet. 3-11), that case also involves attempts by government contractors to enjoin disclosure of EEO-1 reports and AAP's obtained by the government under Executive Order 11246 and the regulations promulgated thereunder. The Fourth Circuit rejected the contractors' contention that disclosure of the AAP's and EEO-1 reports, in their entirety, was prohibited by Section 709 (e) (No. 76-1192, Pet. App. A, pp. 15a-17a; 542 F. 2d at 1199). The court, however, affirmed the findings of the district courts (made after a *de novo* trial) that the information in certain

¹²The district court believed (Pet. App. 10a) that "the scope of §1905 is no broader than the scope of the (b)(4) exemption * * * ." See also *Westinghouse Electric Corporation v. Schlesinger*, *supra*, 542 F. 2d at 1206 (note 13, *infra*). Petitioners suggest (Pet. 26) that the standard of confidentiality in exemption 4 has been narrowly defined by the District of Columbia Circuit, but they do not explicitly take issue with the district court's statement, and they do not designate what, if any, portions of the documents in question contain information of the character described in 18 U.S.C. 1905 but not exempt from mandatory disclosure under exemption 4.

portions of the documents was within *both* exemption 4 of the FOIA and 18 U.S.C. 1905,¹³ and enjoined the disclosure of those portions of the reports (No. 76-1192, Pet. App. A, pp. 56a-57a; 542 F. 2d at 1215-1216).¹⁴

The questions presented in *Westinghouse Electric* (No. 76-1192, Pet. 2) are:

1. Whether the government, pursuant to regulations, may disclose information that is exempt from mandatory disclosure under the Freedom of Information Act and that is of the character described in 18 U.S.C. 1905.

2. Whether judicial review of an agency's decision to disclose information pursuant to the regulations is limited to review of the administrative record for abuse of discretion.

Those questions do not include as "subsidiary question[s] fairly comprised therein" the questions posed by petitioners here. Rule 23(c) of the Rules of this Court.

¹³The Fourth Circuit stated that the standard of confidentiality of exemption 4 and 18 U.S.C. 1905 were the "same" or "coextensive" (No. 76-1192, Pet. App. A, pp. 27a, 36a; 542 F. 2d at 1203, 1204, 1207). The standard of confidentiality adopted by the court was the same as that adopted by the District of Columbia Circuit (No. 76-1192, Pet. App. A, p. 35a; 542 F. 2d at 1207).

¹⁴The court held that government contractors were entitled to an injunction barring any disclosure that would violate 18 U.S.C. 1905 (No. 76-1192, Pet. App. A, p. 41a; 542 F. 2d at 1210). In the alternative, the court of appeals held that exemption 4 provided the supplier of confidential commercial or financial information with an absolute right to have such information withheld from the public (No. 76-1192, Pet. App. A, pp. 41a-42a; 542 F. 2d at 1210). The court also ruled that the contractors correctly had been afforded a trial *de novo* in the district court on the question whether the information fell within either 18 U.S.C. 1905 or exemption 4.

The Fourth Circuit in *Westinghouse Electric* held that the disclosure prohibition of Section 709(e) did not apply and, thus, our petition raises no question on the validity of that ruling. Because the time for filing a cross petition has run,¹⁵ the respondents in *Westinghouse Electric* cannot raise that issue, since the logic of the contrary argument, *i.e.*, that disclosure of EEO-1 reports is barred by Section 709(e), would lead to a significant modification of the judgments to afford those respondents broader rights to nondisclosure than the lower courts recognized.¹⁶ *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-227 n. 2.

With respect to 18 U.S.C. 1905, the government's petition in *Westinghouse Electric* does not place in issue whether that statute is an exemption 3 statute. Indeed, since the government's petition seeks to have this Court consider whether regulations promulgated by the Secretary of Labor providing for disclosure of EEO-1 reports and AAP's (41 C.F.R. Part 60-40) constitute the disclosure "authorization" contemplated by 18 U.S.C. 1905, this Court (if the petition is granted) need not reach the question of whether that statute is incorporated by exemption 3. If our argument is sustained, it is immaterial whether exemption 3 of the FOIA incorporates 18 U.S.C. 1905: disclosure of the documents would be authorized and therefore permissible in either event. If the argument is rejected, the Court will be left with

¹⁵The judgments of the court of appeals in the *Westinghouse Electric* case were entered on September 30, 1976.

¹⁶The court of appeals' judgments in *Westinghouse Electric* permit disclosure of certain portions of the documents at issue there which could not be disclosed if Section 709(e) applied (see No. 76-1192, Pet. App. A, pp. 6a-7a; 542 F. 2d at 1195, 1216). Thus, unlike *United States v. New York Telephone Co.*, petition for a writ of certiorari granted January 25, 1977 (No. 76-835), an argument by respondents in *Westinghouse Electric* based on Section 709(e), if accepted, would change the practical result of the decision below.

a finding that the documents ordered withheld are protected from mandatory disclosure by exemption 4 of the FOIA, and there will be no need for the Court to decide whether the documents also were protected from mandatory disclosure by exemption 3.¹⁷

3. Petitioners suggest (Pet. 29) that certiorari before judgment is appropriate because "the District of Columbia Circuit has already addressed the legal issues raised by this petition * * * ." We are not aware of any case in which this Court has deemed it appropriate to grant certiorari before judgment on this ground alone. Cf. Stern & Gressman, *Supreme Court Practice*, §4.21, pp. 183-184 n. 48 (1969 ed.). Moreover, although it is true that the District of Columbia Circuit in other cases has resolved the issues raised here adversely to petitioners' position, that does not mean that petitioners are foreclosed from appealing or that an appeal necessarily would be fruitless. Petitioners of course may attempt to persuade the court of appeals that its earlier rulings on these issues are incorrect.

More significantly, it would appear to be open to petitioners to challenge the findings of the district court (see Pet. App. 26a-27a, 32a n. 85) that certain portions of the documents are not exempt from mandatory disclosure under exemptions 4 and 6 of the FOIA and therefore must be disclosed. Petitioners apparently do not claim such exemptions for all portions of the documents in question (see Pet. App. 14a n. 27). But the district court did reject petitioners' claims under exemptions 4 and 6 with respect to

¹⁷If under our second question presented in *Westinghouse Electric* the Court holds that review of an agency decision to disclose is limited to review of the agency record, the appropriate disposition would be to vacate and remand for such review. But that disposition would not require the Court to consider whether exemption 3 incorporates 18 U.S.C. 1905.

certain portions of the documents (Pet. App. 26a-27a, 32a n. 85), and petitioners presumably could pursue these claims on appeal. Such claims, since they involve the application of the FOIA to specific documents, have not "already [been] addressed" by the court of appeals.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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